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IN THE

Supreme Court of the United States

October Term, 1966

No. 807

KENNETH BURKARD and MORGAN SIEFERT,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

VICTOR RABINOWITZ,
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LEONARD B. BOUDIN,
HENRY WINESTINE.

November 25, 1966.

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IN THE

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No.

KENNETH BURKARD and MORGAN SIEFERT,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Kenneth Burkard and Morgan Siefert, having appealed from a judgment of the Court of Appeals of the State of New York affirming an order of the Appellate Division of the Supreme Court of the State of New York dismissing their appeals from a judgment of conviction for conspiracy to violate Section 244, New York Penal Law, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the Court of Appeals is reported at 18 N. Y. 2d 148, 272 N. Y. S. 2d 357, 219 N. E. 2d 183 and is appended hereto as Appendix A (page 12, *infra*). The opinion of the Appellate Division of the Supreme Court is

reported at 25 A. D. 2d 182, 268 N. Y. S. 2d 94, and is appended hereto as Appendix B (page 13, *infra*). The unreported opinion of the trial court denying appellant's motion to suppress eavesdropped evidence is appended hereto as Appendix C (page 19, *infra*).

Jurisdiction

Appellants, and others, were indicted on June 12, 1964 (in a superseding indictment) on two counts. The first count charged a conspiracy to commit the crimes of assault, coercion and violation of N. Y. Penal Law § 555. The second count charged a conspiracy to commit the crimes of injury to property and violation of N. Y. Penal Law § 1423, subdivision 6.

The appellants moved, prior to trial, pursuant to New York Code of Criminal Procedure (hereinafter "C.Cr.Proc.") § 813-c, to suppress the fruits of electronic eavesdropping which had been effected under judicial orders as provided in C.Cr.Proc. § 813-a. The motion was denied, and was made again at the commencement of the trial. After a hearing, the motion was again denied, and appellants, relying upon the procedure provided in C.Cr.Proc. § 813-c, pleaded guilty to the crime of conspiracy to commit the crime of assault in the third degree, a misdemeanor, reserving their right to appeal. Appellant Burkard was sentenced to a six months term and appellant Siefert a three month term in the New York City Penitentiary. Both were released on parole pending appeal.

The Appellate Division of the Supreme Court on March 29, 1966 dismissed the appeal after submission on the merits and the Court of Appeals on July 7, 1966 affirmed, suggesting that appellants could withdraw their guilty pleas and proceed to trial. Notice of appeal to this Court from the said judgment of the Court of Appeals was filed on October 3, 1966 in the New York Supreme Court, New York County.

Jurisdiction of this appeal is conferred by 28 U.S.C. § 1257(2). The following cases sustain the Court's jurisdiction: *Hoyt* v. *Florida*, 368 U.S. 57; *McGowan* v. *Maryland*, 366 U.S. 420.

Statutes Involved

The principal statutes involved are §§ 813-a and 813-c of the New York Code of Criminal Procedure, which provide:

> "§ 813-a. Ex parte order for eavesdropping
>
> An ex parte order for eavesdropping as defined in subdivision one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as

authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner, be retained by the judge or justice denying the same."

"§ 813-c. The motion in general

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

Questions Presented

1. Did electronic eavesdropping, accomplished by physical trespass upon premises occupied by some of defendants, done pursuant to *ex parte* court orders as authorized by New York Penal Law section 813-a, constitute an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution and compulsory self-incrimination prohibited by the Fifth and Fourteenth Amendments to the United States Constitution?

2. Were the court orders which authorized such eavesdropping unreasonably broad, and were they based upon sufficient showing of probable cause, under the standards required by the Fourth and Fourteenth Amendments to the United States Constitution?

3. Did such eavesdropping violate defendants' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution where it was committed in premises occupied by a labor union during an important representation election campaign?

Statement of the Case

This prosecution arose out of a contest between two labor organizations for the right to represent certain employees of the New York Telephone Company. The employees had been represented by Local 1101 Communications Workers of America (hereinafter called "C.W.A."). In 1964 the International Brotherhood of Teamsters (hereafter called "the Teamsters") petitioned the National Labor Relations Board for an election, and a vigorous campaign ensued. On December 30, 1964, six weeks before the scheduled election, Local 1101, of which appellants were members and Henry Habel, whose appeal is being separately taken, was president, voted to disaffiliate from C.W.A. and to affiliate with the Teamsters. Three weeks later, appellants were indicted, with a great deal of resultant adverse publicity. The election was held February 14, 1965. The Teamsters lost by a vote of about 11,000 to 9,000.

At the commencement of the trial a hearing was held on appellants' motion to suppress eavesdropped evidence. The eavesdropping had been conducted pursuant to six *ex parte* orders issued pursuant to § 813-a C.Cr. Proc. Twenty-three reels of tape were offered in evidence.

The first eavesdropping order was issued on the basis of the affidavits of two assistant district attorneys, Andreoli and Scotti. The Andreoli affidavit stated that "This office has received information from a confidential informer" that appellant Burkard paid $100 to have a member of the rival union beaten up, that Burkard indicated to the informer that future assaults were planned and a conference would be held that evening, and on the same day he was observed to enter the C.W.A. office with five men (A263-A264).*

Mr. Andreoli's affidavit concluded that there was reasonable ground to believe

> "... that evidence of crime may be obtained by overhearing and recording the conversations, communications and discussions taking place between persons present in the office of the Communications Workers of America ..." (A264)

Mr. Scotti's affidavit stated that he had read Mr. Andreoli's and on the facts stated therein, it was his opinion

> "... that evidence of crime may be obtained by overhearing and recording conversations, communications and discussions taking place in the ... office."

The order of Justice Sarafite authorized the installation of equipment

> "... to overhear and record ... any and all conversations, communications and discussions that may take place in the office of the Communications Workers of America ..."

and was made effective until September 2, 1963 (A261-A262).

An extension of the order was procured based on almost identical affidavits which included, however, reference to

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* Page references are to the printed record in the New York Court of Appeals which constitutes the record on this appeal.

facts obtained in an intercepted conversation (A268-274). A further extension was similarly procured (A275-281).

While the eavesdropping was in effect at the C.W.A. office, a similar application was made to eavesdrop at the Teamsters' office (A282-A288) and was later extended (A289-A294).

Another order was issued for eavesdropping in rooms at the hotel in which the C.W.A. office was located, based upon conversation overheard at the C.W.A. office (A295-A301).

Common to each application was the following: (1) In every case the express purpose was to secure "evidence of a crime". (2) In every case the affidavits sought and the orders issued granted authority to eavesdrop and record "any and all conversations, communications and discussions" at the various premises. In no case was there a designation of any persons whose conversations were to be overhead, or a description of the conversations. (3) The initial applications were based upon facts supplied by a confidential informer with no supporting facts as to the informer's reliability or trustworthiness. Extension orders were based upon the same facts plus the information obtained from earlier eavesdropping, but there was no allegation that the deponents had personally heard recordings of such conversations.

The eavesdropping at the C.W.A. office was authorized by the three orders for a consecutive period of five months and 25 days. At the Teamsters' office eavesdropping was authorized for two separate two month periods. § 813-a, by its terms, permits eavesdropping orders of up to two months duration.

The opinion of the trial judge denying the motion to suppress recites in detail a number of facts relating to the identity of the informer and the information he gave to the

district attorney. None of those facts were presented to the judges who issued the eavesdropping orders, nor do they appear anywhere in the record.

The Questions are Substantial

The New York eavesdropping statute and the orders issued pursuant to it in this case offend the fundamental principles of the Fourth Amendment, applicable to the states by virtue of the Fourteenth Amendment. *Ker* v. *California*, 374 U.S. 23; *Mapp* v. *Ohio*, 367 U.S. 643.

This case, in a somewhat different posture, raises the same issues as are presented in *Berger* v. *New York*, No. 615, and related issues to those in *Cohen* v. *New York*, No. 614 (involving wiretapping pursuant to § 813-a). This case, *Berger* and *Cohen* were argued in the New York Court of Appeals at the same time and decided on the same day.

Eavesdropping effected by a physical intrusion is a search and seizure within the Fourth Amendment. *Silverman* v. *United States*, 365 U.S. 505; *Clinton* v. *Virginia*, 377 U.S. 158. Therefore evidence of eavesdropping is inadmissible at a criminal trial if the Fourth Amendment standards are not met.

1. The eavesdropping orders were not based upon probable cause. The supporting affidavits on the initial applications refer simply to information obtained from a "confidential informer", with nothing more. Despite the repeated warnings from this Court that such information will not support a warrant, *e.g.*, *Aguilar* v. *Texas*, 378 U.S. 108, the New York court here accepted the prosecutors' conclusory affidavits. The affidavits in this case do not even contain the token statement that the informant was believed to be reliable. In denying the motion to suppress the trial court relied upon information never presented to

the judge who issued the orders, not offered at the suppression hearing, and never made available to appellants.

The renewal orders, being based upon information obtained in eavesdropping pursuant to the original orders, have the further defect of being based upon illegally obtained evidence. *Silverman* v. *United States, supra; Wong Sun* v. *United States,* 371 U.S. 471; *Silverthorne Lumber Co., Inc.* v. *United States,* 251 U.S. 385.

2. The eavesdropping orders in this case lacked the particularity required by the Fourth Amendment. By authorizing the overhearing and recording of "any and all conversations" at the designated premises for periods of up to six months, those orders were general searches which the Fourth Amendment was designed to prevent. Conceivably an eavesdropping order could be limited to a single conversation between named individuals on a specified date.[1] Short of that any eavesdropping order violates the limitations enunciated in *Stanford* v. *Texas,* 379 U.S. 476 and *Marron* v. *United States,* 275 U.S. 192.

3. The New York statute expressly authorizes eavesdropping to obtain "evidence of a crime" and it was for this avowed purpose that the subject orders were issued. But mere evidence may not be the subject of a search. *Harris* v. *United States,* 331 U.S. 145, 154; *Gouled* v. *United States,* 255 U.S. 298; *United States* v. *Lefkowitz,* 285 U.S. 452; *Hayden* v. *Warden,* 363 F. 2d 647, cert. granted No. 480, November 8, 1966.

4. Appellants' privilege against self-incrimination was violated by the eavesdropping. The recorded conversations, when placed in evidence, are in fact confessions involuntarily extracted. As the supporting affidavit on the first order unequivocally indicates (A263), appellant Burkard,

[1] Whether such an order could be executed seems doubtful, as it would be necessary to monitor, and probably record, all other communications in the premises.

if not the other appellants, was already the subject of investigation as a prospective defendant. Confessions are involuntary when "the methods used to extract them offend an underlying principle in the enforcement of our criminal law." *Rogers* v. *Richmond,* 365 U.S. 534, 541.

In *Massiah* v. *United States,* 377 U.S. 201, a conviction based on a confession made, unknowingly, to a government agent was reversed. There the confession occurred after indictment, and was made to a confederate who was cooperating with the prosecution. Here the confession was made to a hidden microphone. There can be no question here that the accused assumed the risk of a defecting accomplice, which troubled the minority in *Massiah.* And it is difficult to see how an involuntary confession procured prior to indictment is less prejudicial than one extracted after indictment.

Most recently, in *Miranda* v. *Arizona,* 384 U.S. 436, the Court dealt with the psychologically coercive effect of sophisticated police questioning of persons in their custody. Where a confession can be procured surreptitiously the police are happily free of *Miranda* problems. It is far simpler to bug a suspect's house than to interrogate him. It may take six months, but with patience, and complaisant courts, a confession will ultimately be obtained.

The highest court of the State of New York has interpreted § 813-a to permit general searches and compulsory self-incrimination without any showing of probable cause. As so interpreted, the statute clearly violates the Fourteenth Amendment.

5. The fact that two of the premises where eavesdropping occurred were the offices of labor unions, and that an important organizing campaign was in progress, renders the statute invalid on First Amendment grounds as well. The interception of "any and all conversations" in union offices for periods of four and six months respectively is

an intrusion upon the conduct of union affairs which interferes drastically with the rights to free speech and assembly vitally important to a labor organization. Thus, in *Local 309, United Furniture Workers of America* v. *Gates*, 75 F.Supp. 620, a union sought to enjoin police from attending its meetings. The court recognized the inhibiting effect of the police presence on First Amendment rights and granted the injunction.

In *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 430 the Court noted the First Amendment protection which cloaks certain group activity. "We have deemed privileged, under certain circumstances, the efforts of a union to organize workers. *Thomas* v. *Collins* [323 U. S. 516]." The dissenting opinion of Mr. Justice Harlan, speaking for himself and Justices Clark and Stewart, was in full agreement with the proposition. 371 U. S. at 453-454.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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November 25, 1966.

APPENDIX A

Opinion of the New York Court of Appeals

Per Curiam:

To pursue the special kind of appeal allowed "notwithstanding" a plea of guilty by the third paragraph of section 813-c of the Code of Criminal Procedure, conditions prescribed by that section must be met.

This kind of an appeal is authorized when taken from the denial of a motion for the return or suppression of property, papers or things "unlawfully obtained" which may be used in evidence in a criminal proceeding against the moving party.

Recordings of conversations made pursuant to judicial orders authorizing eavesdropping under section 813-a of the Code of Criminal Procedure, are not such property "unlawfully obtained" and a party aggrieved by a denial of a motion addressed to such recordings is left to appeal under the general avenues open in criminal cases. On the concession of the district attorney, appellants may, if they are so advised, withdraw their pleas of guilty.

The dismissal of the appeal by the Appellate Division was a final determination affecting a substantial right and the appeal to this court was properl allowed and is considered on the merits (Code Crimin. Pro., § 519 [5]; *People* v. *Pitts*, 6 N. Y. 2d 288; *People* v. *Pride*, 3 N. Y. 2d 545).

The orders should be affirmed.

APPENDIX B

Opinion of the Appellate Division of the Supreme Court

Per Curiam:

After the trial court denied a motion by defendants to suppress evidence of conversations obtained pursuant to eavesdropping orders issued under section 813-a of the Code of Criminal Procedure, each defendant, with the permission of the court, withdrew his plea of not guilty and pleaded guilty to the crime of conspiracy to commit the crime of assault in the third degree, a misdemeanor, under the first count of the indictment, the plea to cover the entire indictment. Following these pleas, judgments of conviction were entered on July 23, 1965, on which date an order was also entered implementing the previous denial of the motion to suppress. The People urge that the appeals taken from these dispositions should be dismissed on the ground that in the absence of a permissive statute a plea of guilty "poses no question for review" (*People* v. *Mason*, 307 N. Y. 570, 575). Defendants submit that such a statute is found in section 813-c of the Code of Criminal Procedure.

The type of motion to which section 813-c applies, and the denial of which "may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty," is a motion for the return of "property, papers or things" obtained by an unlawful search and seizure, or for the suppression of their use as evidence. Eavesdropped conversations are not within the literal scope of section 813-c (*People* v. *Laverne*, 14 N. Y. 2d 304, 309-310). While it is argued, not without some force, that the section is sufficiently elastic to allow suppression of tape recordings procured as a consequence of an initial trespass, we may not overlook that title II-A of the Code of Criminal Procedure deals expressly and exclusively with eavesdropping (which

by definition includes the recording of a conversation by means of instrument [Penal Law, § 738]); that the suppression procedure provided by title II-B, of which section 813-c is a part, has no parallel in title II-A; and, more immediately pertinent, that the Legislature chose to withhold from the latter title any authority to entertain appeals of the instant character. It is concluded, accordingly, that the appeals should be dismissed.

The record indicates that the pleas of guilty were influenced by defendants' belief that appeals would lie to test the legality of the eavesdropping, and defendants informed the court of their intention to appeal at the time their pleas were offered. The People's brief acknowledges that "where, as here, the defendants' misconceptions were announced at the time of pleading, and were not corrected by the prosecutor or court," withdrawal of a plea of guilty is warranted in the interest of justice.

The appeals should be dismissed. Of course, defendants may move to withdraw their guilty pleas in the court below, presumably with the consent of the People, as indicated in their brief.

All concur.

APPENDIX C

Opinion of Trial Court Denying Motion to Suppress

SCHWEITZER, J.:

This is a motion to suppress evidence seized pursuant to eavesdropping orders issued under section 813-a of the Code of Criminal Procedure. The facts show that one John Howard informed the District Attorney's Office of New York County that Kenneth Burkhard paid him $100 to have a member of the Communications Workers Union beaten up. Burkhard, he explained, was acting on behalf of the International Brotherhood of Teamsters (hereinafter referred to as the Teamsters) in an effort to supplant the Communications Workers of America (hereinafter referred to as the C.W.A.) as bargaining agent for the New York Telephone Company. On June 20, 1963 Burkhard discussed with Howard "contracts" for assaults upon people opposed to the Teamsters, but said he would have to confer with his associate that evening to determine steps to be taken in the future. Later that day, Burkhard and five others were observed entering the office of the C.W.A., Local 1101, located on the mezzanine floor of the Hotel Forrest, 224 West 49th Street, New York City. The statements of John Howard were verified for accuracy and reliability by recording Howard's conversations with the defendant Burkhard with the consent of Howard.

In order to investigate further possible violations of Sections 850, 380, and 240 of the Penal Law, Assistant District Attorneys Peter Andreoli and Alfred J. Scotti swore to the aforementioned facts in affidavits dated July 3, 1963, and petitioned the Honorable Joseph A. Sarafite, a Justice of the Supreme Court, to issue an order referring to or directing the overhearing of conversations taking place at the above-mentioned offices. That order was signed on July 2, 1963 and made effective to and including

September 2, 1963. A renewal of that order was signed by the Honorable Abraham Gellinoff on August 30, 1963, Justice Sarafite being in Europe at that time, and it was made effective to and including October 29, 1963. Finally, a similar renewal order pertaining to the same premises was signed by the Honorable John A. Mullen on October 29, 1963, Justice Sarafite being assigned in another county and not being available. This order was effective to and including December 28, 1963. A copy of the original order and affidavit was attached to each renewal order as well as affidavits which pointed out what further facts had been uncovered in the course of investigation which evidenced a conspiracy.

The eavesdropping device was installed in the C.W.A. office of Local 1101 pursuant to court order without the consent of the defendants or of anyone else. On August 23, 1963, a conversation between Habel and another union member was intercepted. Habel declared that he expected to acquire a .38 calibre gun, that he had no permit to carry such a gun, and that he had no intention of applying for such a permit. They disclosed that they intended to shoot a person opposed to their union activities, not kill him, but cripple him in both legs.

On September 9, 1963, Burkhard requested the informant, Howard, to arrange to beat up another member of the C.W.A. sometime in the future. On September 10, 1963, Burkhard met with William Olsen and William Genoese who are employed in the Communications Division of the Teamsters, and the following day, advised Howard that there had been a change; a more important figure was to be beaten up in the next few days; the plan was to incapacitate him for two to three months. Police information disclosed that Olsen and Genoese occupied room 437, 150 Fifth Avenue, New York City, Communications Division of the International Brotherhood of Teamsters.

Appendix C

Assistant District Attorneys Andreoli and Scotti set forth these facts (together with the facts contained in their affidavits of July 3, 1963) in affidavits dated September 12, 1963, on the basis of which the Honorable Justice Sarafite signed an order directing the overhearing of conversations at these premises. The order was extended to and including November 11, 1963. Evidence obtained pursuant to this order disclosed that Habel had contacted Genoese and the two were conspiring together to frighten those opposed to the Teamsters. On the basis of this fact and the original affidavits and orders of September 12, 1963, a renewal of this order was signed by the Honorable John Mullen on December 20, 1963 and made effective through February 19, 1964.

Information received from John Howard and evidence obtained pursuant to court orders all pointed to the fact that Habel and Burkhard had agreed to use physical force to create a new union in place of the C.W.A. or to turn control of the union over to the Teamsters. In furtherance of their plan, Habel had set up a "secret" office in rooms 612-614 Hotel Forrest registered in the name of Walker. On November 3, 1963, in a conversation recorded pursuant to court order, Burkhard called room 612. Habel answered, identifying himself as Walker, and Burkhard responded, "I'll be right up." On the basis of these facts set forth in the affidavits of Assistant District Attorneys Andreoli and Scotti, Justice Sarafite signed an overhearing order for rooms 612-614 on November 4, 1963. The order was made effective through and including January 4, 1964.

As a result of the eavesdropping conducted pursuant to these court orders, the conspirators who were directing the actions of the defendant Burkhard were identified and their conspiratorial conversations were overheard, and the assaults which were paid for were in fact prevented. It is to be noted that conversations pertaining to union matters and social relations were not recorded.

Appendix C

The defendants were charged with two counts of conspiracy. The first charged them with having conspired with each other and with others to commit the crimes of assault, coercion, and violations of Section 555 of the Penal Law, during the period from April, 1963 to January 8, 1964. In twenty-five overt acts it is alleged that eight named persons were to be beaten as well as others, that money was paid for this purpose and that a threatening telephone call was made. The second count charged a conspiracy during this same period to commit crimes of injury to property and to interfere with telephone lines. There are nine overt acts alleged.

The case came to trial before this Court, and after introducing the aforementioned orders and affidavits as well as reels of tape recorded pursuant thereto, a motion to suppress the evidence was heard and denied. Whereupon, on March 28, 1965 the defendants pleaded guilty to a lesser charge of conspiracy to commit the crime of assault in the third degree, a misdemeanor.

On the facts as set forth, this Court is satisfied that the information in the possession of the District Attorney's office was sufficient to form probable cause for the issuance of the eavesdropping order in conformity with the requirements of Section 813-a of the Criminal Code, and further, that the information obtained as a result of the first order was sufficient under the requirements of the statute to authorize the further issuance of additional orders. Indeed, each affidavit is itself sufficient on its face to procure a warrant for eavesdropping. I further find that Section 813-a conforms to the constitutional requirements for a warrant.

The motion to suppress is therefore denied.

APPENDIX D

Judgment of the Court of Appeals of the State of New York

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR July 7, 1966.

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1. No. 233. 66

The People &c.,

Respondent,

vs.

Henry Habel, & ors.,

Appellants,

and

Wililam Griffin,

Defendant.

BE IT REMEMBERED, That on the 14th day of May in the year of our Lord one thousand nine hundred and sixty-six,

Henry Habel, & ors., the appellants in this cause, came here unto the Court of Appeals, by Mayer, Weiner & Mayer, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent —in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Vincent F. Fuller, of counsel for the appellants Habel, McGovern and Rodriguez, and by Mr. Victor Rabinowitz, of counsel for the appellants Seifert and Burkhard, and by Mr. Michael Juviler, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the orders of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said orders affirmed, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form

of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON
Clerk.